

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Cable & Telecommunications
Association,

Complainant,

v.

San Diego Gas & Electric Company (U902E),

Defendant.

Case 17-11-002

MODIFIED PRESIDING OFFICER'S DECISION DISMISSING COMPLAINT

Summary

California Cable & Telecommunications Association brings this complaint against San Diego Gas & Electric Company seeking Commission resolution of their dispute regarding pole attachment fees. The complaint is dismissed without prejudice to California Cable & Telecommunications Association bringing an application to resolve this dispute pursuant to Decision 98-10-058's expedited dispute resolution procedures.

Background

Pub. Util. Code § 767 establishes the Commission's authority to determine the compensation, terms and conditions for a public utility's use of another public utility's poles or other equipment whenever the public utilities are unable

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to reach agreement. Section 767.5(c)¹ establishes the Commission's similar authority to determine and enforce pole attachment rates, terms and conditions whenever a public utility and a cable television operator or association are unable to reach agreement. Decision (D.) 98-10-058 (the "Rights-of-Way (ROW) Decision") implements these sections by adopting rules, guidelines and performance standards for negotiated ROW access agreements and expedited dispute resolution procedures for resolving disputes relating to them.

California Cable & Telecommunications Association (CCTA) and San Diego Gas & Electric Company (SDG&E) entered into a settlement agreement that, among other things, established a pole rate schedule for the years 2009 through 2016 that culminated in a 2016 attachment rate of \$16.35. On September 16, 2016, SDG&E notified CCTA that its 2017 pole attachment rate would increase to \$30.58. Since then, the parties have engaged in negotiations over the proposed 2017 rate, but have reached an impasse.

CCTA brings this complaint seeking Commission resolution of the dispute pursuant to Section 767.5(c). SDG&E moves to dismiss on the basis that the ROW Decision's expedited dispute resolution procedure, rather than a complaint, is the appropriate vehicle to resolve this dispute. We concur.

Discussion

The Commission's complaint procedure is not intended for purposes of the determination of pole attachment fees. Rule 4.1(a) of the Commission's Rules of Practice and Procedure² requires a complaint to "set[] forth any act or thing done

¹ All subsequent statutory references are to the Public Utilities Code unless otherwise noted.

² CA Code of Regulations, Title 20, Div.1, Ch.1.

DRAFT

or omitted to be done by any public utility including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission.” Rule 4.2(a) requires the complaint to be “so drawn as to completely advise the defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief which is desired.” In other words, a complaint is required to allege what the utility did or didn’t do, what law or order or rule the action or omission violated, and what the complainant wishes the Commission to order by way of relief. CCTA’s complaint does not do that. Rather, it vaguely asserts that SDG&E’s proposed pole attachment fee is unreasonable and that SDG&E has inadequately explained the basis for it, and asks the Commission to determine a reasonable fee.³

In contrast, the ROW Decision was expressly drawn to establish the procedure for resolving disputes relating to access to public utility right-of-way, which is for the moving party to file a request for arbitration in the form of an application.⁴ That vehicle, not a complaint, is the appropriate one for resolving this dispute.

CCTA argues that precedent demonstrates that arbitration is not required because the Commission “has routinely accepted and determined pole

³ As CCTA recognizes, this complaint does not qualify as a complaint for the determination of the reasonableness of rates pursuant to Section 1702 and Rule 4.1(b). Those rates are for the utilities’ core customer services, which pole attachment fees are not. (CCTA opposition to Motion to Dismiss, pp. 11-12.)

⁴ D.98-10-058 at 109, “We shall therefore adopt an expedited procedure for resolving disputes relating to access to ROW and support structures as set forth below.”

DRAFT

attachment fee complaints both before and after adoption of the ROW Order.”⁵ More accurately, the Commission accepted five pole attachment fee complaints prior to the instant case, three of which were dismissed upon stipulation of the parties.⁶ The Commission determined the merits of one complaint before the adoption of the ROW Decision⁷ and one complaint after it.⁸ It took two decisions to resolve the post-ROW Decision complaint on its merits, neither of which identifies or resolves the issue of whether the Commission’s complaint procedures or the ROW Decision’s expedited dispute procedure is the appropriate vehicle for resolving a pole attachment fee dispute. Thus, this issue comes before us as a matter of first impression.

CCTA argues that the ROW Decision limits the expedited dispute resolution procedures contained in Section XI of Appendix A to disputes over initial access to a utility’s facilities, and that the procedures do not apply to subsequent disputes such as this. In support of this argument, CCTA argues that the ROW Decision’s discussion of disputes “proceeds from the premise that ‘disputes over requests for initial access’ are distinguished from ‘all other disputes over access,’”⁹ as evidenced by the ROW Decision’s statement that “[d]isputes involving *initial* access to utility rights of way and support structures”

⁵ CCTA Opposition to Motion to Dismiss, p. 10.

⁶ See D.98-06-045, D.99-09-040, and D.11-03-002.

⁷ See D.98-04-062.

⁸ See D.02-03-048 and D.03-05-055.

⁹ CCTA Opposition to Motion to Dismiss, p. 9.

DRAFT

are to be resolved through the procedure.¹⁰ CCTA misstates the ROW Decision. The cited discussion merely describes the position of a specific party who asserts that initial access disputes should be processed through an expedited dispute resolution procedure (and who agrees that, for all other disputes, arbitration is a useful alternative to the Commission's complaint process).¹¹ The ROW Decision does not discuss the merits of adopting different procedures for initial access disputes and other disputes. To the contrary, and notwithstanding the reference to "initial" access in the summary of a specific party's position, the entirety of the ROW Decision's discussion of expedited dispute resolution refers simply to "ROW access" without regard to whether it is "initial" or continuing.¹²

Furthermore, if the expedited dispute resolution procedure in Section IX were held to apply only to "initial" access disputes, it would leave a regulatory gap with respect to the regulation of the rates, terms and conditions of subsequent access. Section 224 of the Pole Attachments Act (47 U.S.C. § 224) gave the Federal Communications Commission (FCC) jurisdiction to regulate the rates, terms and conditions of attachments by cable television operators and telecommunications carriers to the poles, conduit or ROW owned or controlled by utility in the absence of parallel state regulation. However, as the ROW Decision states, "By virtue of the rules we issue pursuant to the instant Decision, we hereby certify to the FCC that we regulate the rates, terms, and conditions of access to poles, ducts, conduits, and ROW in conformance with §§ 224(c)(2) and

¹⁰ D.98-10-058, App. A, Section IX, "Expedited Dispute Resolution Procedures," emphasis added.

¹¹ *Id.*, at 105-106.

¹² *See id.*, at 109-112.

DRAFT

(3)."¹³ The expedited dispute resolution procedures in Section XI are the only rules in the ROW Decision that address the resolution of complaints regarding ROW access. As the ROW Decision is intended to fill the regulatory field, we interpret the expedited dispute resolution procedure in Section XI to apply equally to all ROW access disputes.

Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge in this proceeding.

Appeal

The Presiding Officer's Decision (POD) in this case was mailed on March 19, 2018. CCTA filed an appeal on April 18, 2018, and SDG&E filed a response on May 3, 2018.

CCTA asserts that Section 767.5(c) requires this pole attachment rate complaint to be addressed through the Commission's complaint procedures. (Appeal, p.7.) To the contrary, Section 767.5(c) requires the Commission to establish the terms, conditions, or compensation for pole attachments if the parties are unable to agree upon them; it does not dictate the procedures for doing so.

CCTA asserts that, by virtue of Section 1701.1(b)(1)'s requirement that the assigned Commissioner issue a scoping memo that describes the issues to be considered and schedule for resolution, the Commission is required to resolve all contested issues that are raised in a proceeding. (Appeal, p.8.) CCTA's

¹³ *Id.* at 9.

DRAFT

suggestion that Section 1701.1 precludes dismissal of a case without reaching the substantive issues is absurd and contrary to abundant precedent.¹⁴

CCTA asserts that, because 47 U.S.C. § 224 uses the term “complaint” in addressing the FCC’s and state Commissions’ respective authority with respect to the regulation of pole attachment rates, terms, and conditions, and because the Legislature stated its intent that Section 767.5 conform “with the policy and procedures of the [FCC] respecting charges and costs for the attachment of cable television apparatus to utility poles and structures,” the Commission is required to use its complaint procedures to resolve individual matters concerning pole attachment rates, terms and conditions. (Appeal, pp. 9-10.) CCTA asserts that, otherwise, the Commission will potentially lose jurisdiction over pole attachment matters. (Appeal, pp. 22-23.) By this reasoning, which we reject, the Commission would be barred from using the ROW Decision’s expedited dispute arbitration procedures to resolve *any* dispute regarding the rates, terms, and conditions, whether for initial access or continuing access. This conclusion contradicts CCTA’s assertion that the ROW Decision’s expedited dispute resolution procedures only applies to disputes over initial access. (Appeal, p.15.) The reasonable interpretation of legislative intent of Section 767.5 is to direct the Commission to conform to the FCC’s *substantive* policies and procedures for determining the rates, terms, and conditions for pole attachments, not to dictate any particular procedural vehicle for making those determinations.

¹⁴ Although CCTA makes this claim only with respect to adjudicatory proceedings, its flawed reasoning applies equally to all formally filed proceedings regardless of category. Section 1701.1(b)(1) applies to both adjudicatory and ratesetting proceedings, Section 1701.1(c) applies to quasi-legislative proceedings, and both require the setting of a prehearing conference and the issuance of a scoping memo with a schedule for resolution.

DRAFT

Furthermore, requiring the Commission to use its complaint procedures, rather than another procedural vehicle, to adjudicate disputes regarding pole attachment rates, terms, and conditions serves no apparent practical or policy purpose. CCTA asserts that the ROW Decision's expedited dispute resolution procedures "provides extreme bargaining power to utilities" which is irreconcilable with the ROW Decision's recognition that utilities have a significant bargaining advantage in comparison to attaching entities (Appeal, p.18.) However, this assertion misrepresents the ROW Decision, which refers to the utilities' significant bargaining advantage with respect to private negotiations outside of a regulatory forum, and adopts the expedited dispute resolution procedures precisely in order to level the playing field.

CCTA asserts that the POD erroneously dismisses its complaint on grounds other than whether, assuming the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law. (Appeal, pp. 23-24.)¹⁵ To the contrary, and as discussed previously, CCTA's complaint warrants dismissal for failing to allege any facts that, if proven, would entitle it to judgment as a matter of law. Specifically, assuming as true CCTA's allegations that SDG&E notified CCTA that its pole attachment rate would increase from the previously negotiated rate of \$16.35 to \$30.58 and that the parties have engaged

¹⁵ CCTA asserts that a second standard used by the Commission for dismissal of a complaint is "whether there are any triable issues as to any material fact," and cites to *Westcom Long Distance, Inc. v. Pacific Bell et al.*, 54 CPUC 2d 244 (1994) for this proposition. (Appeal, p.23.) CCTA misstates the decision. As *Westcom Long Distance, Inc.* states, "The motion shall be granted if all the papers show that there is no triable issue as to any material fact *and the moving party is entitled to judgment as a matter of law.*" (54 CPUC 2d at 249, emphasis added.)

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in negotiations but have reached an impasse as true, they do not establish any violation of law or cause of action upon which CCTA would prevail.

Conclusions of Law

1. Assuming as true CCTA's allegations of fact, they do not establish a cause of action upon which CCTA would prevail.
2. An application pursuant to the ROW decision's expedited dispute resolution procedures, rather than a complaint, is the appropriate vehicle to resolve this dispute.
3. This complaint should be dismissed without prejudice to CCTA's ability to bring an application to resolve this dispute pursuant to the ROW decision's expedited dispute resolution procedures.

O R D E R

IT IS ORDERED that:

1. Case 17-11-002 is dismissed without prejudice to California Cable & Telecommunications Association bringing an application to resolve this dispute pursuant to Decision 98-10-058's expedited dispute resolution procedures.
2. All pending motions are deemed denied.
3. Case 17-11-002 is closed.

This order is effective today.

Dated _____, at San Francisco, California.